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SUPREME COURT OF APPEALS OF VIRGINIA.

DONITHAN v. COMMONWEALTH.

June 17, 1909.

[64 S. E. 1050.]

Intoxicating Liquors (§ 216*)—Unlawful Sale—Cider—Indictment—"Ardent Spirits."—Under Acts 1908, p. 275, c. 189, § 1, declaring that all mixtures, preparations, and liquids which will produce intoxication shall be deemed "ardent spirits," within the meaning of the act, an indictment charging the sale of spirituous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof is insufficient to sustain a conviction on proof of sale of cider which would produce intoxication, since while all spirituous liquors are intoxicating, and all intoxicating liquors are ardent by force of the statute, all ardent liquors are not spirituous liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 230-233; Dec. Dig. § 216.* 8 Va.-W. Va. Enc. Dig. 5, 26, 34.

For other definitions, see *Words and Phrases*, vol. 1, p. 491.]

Appeal from Circuit Court, Pulaski County.

One Donithan was convicted of unlawful sale of liquors, and appeals. Reversed and remanded.

H. C. Gilmer and J. L. Wysor, for appellants.

William A. Anderson, Atty. Gen., for the Commonwealth.

KEITH, P. Donithan was indicted in the circuit court of Pulaski county for the unlawful sale by retail of "spiritous and malt liquors, whisky, brandy, wine, ale, beer, or mixtures thereof." Upon the trial the evidence fails to prove the sale of any of the articles specifically mentioned in the indictment, but evidence was admitted of the sale of cider which produced intoxication, and upon this proof the jury rendered a verdict against the defendant, and fixed his fine at \$50, upon which judgment was entered.

During the progress of the trial defendant excepted to the ruling of the court allowing the witness to testify as to the sale of intoxicating cider, upon the ground that no such offense was charged in the indictment, and this ruling presents the only question which need be here considered.

The sale of cider cannot be brought within the terms of the indictment, unless cider is to be considered a spirituous liquor, as it certainly is not a malt liquor, whisky, brandy, wine, ale, beer, or any mixture thereof.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Section 1 of the act of assembly approved March 12, 1908 (Acts Assem. 1908, p. 275, c. 189), declares, that "all mixtures, preparations and liquids which will produce intoxication shall be deemed ardent spirits, within the meaning of this act."

If, therefore, the term "ardent spirits" had been used in the indictment, there would have been room to contend (though we do not here decide) that the charge would have been supported by the proof of sale of any mixture, preparation, or liquid which would produce intoxication. But while all spirituous liquors are intoxicating, and all intoxicating liquors are by force of the statute ardent spirits, it is certain that all ardent spirits are not spirituous liquors. Malt liquors, for instance, are intoxicating, but cannot be classified as spirituous. 17 A. & E. Enc. L. 203; *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79; *Commonwealth v. Livermore*, 4 Gray (Mass.) 20; *Feldham v. Morrison*, 1 Ill. App. 460.

We are of opinion that the indictment does not warrant proof of the sale of cider.

It follows that the judgment of the circuit court must be reversed, and the cause remanded, for further proceedings to be had therein not in conflict with this opinion.

Reversed.

Note.

See annotation to case of *Com. v. Goodwin*, ante, p. 285.

CITY OF RICHMOND *v.* MASON.

June 10, 1909.

[65 S. E. 8.]

1. Municipal Corporations (§ 764*)—Streets—Duty to Keep Safe.—

While a municipal corporation is bound to exercise due care to keep its streets and sidewalks reasonably safe for persons exercising ordinary prudence, it is not required to have them so constructed as to secure absolute immunity from danger in using them, nor is it bound to employ the utmost care to that end.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1616; Dec. Dig. § 764.* 12 Va.-W. Va. Enc. Dig. 901.]

2. Municipal Corporations (§ 821*)—Defective Streets—Liability for Injuries—Negligence.—A municipal corporation is liable for injuries from a defect in a street only where it has been negligent in caring for the street; what constitutes negligence in a particular case being a mixed question of law and fact.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.